STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2007
v	No. 269571 Wayne Circuit Court
DANNY JOSEPH JOHNSON, Defendant-Appellant.	LC No. 05-010313-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

A jury convicted defendant Danny Johnson of the manufacture of marijuana,[1] possession with intent to deliver methadone,[2] possession with intent to deliver hydrocodone,[3] possession with intent to deliver codeine,[4] felon in possession of a firearm,[5] contributing to the delinquency of a minor under the age of 17 years,[6] and felony-firearm.[7]

The trial court sentenced Johnson to one year, two months to four years in prison for the manufacture of marijuana conviction; one year, two months to seven years in prison for the possession with intent to deliver methadone conviction; one year, two months to seven years in prison for the possession with intent to deliver hydrocodone conviction; one year, two months to seven years in prison for the possession with intent to deliver codeine conviction; two years in prison for the felon in possession of a firearm conviction;[8] and two years in prison for the felony-firearm conviction. The trial court granted Johnson time served on his misdemeanor conviction

[1] MCL 333.7401(2)(d)(iii).

[2] MCL 333.7401(2)(b)(ii).

[3] *Id.*

[4] *Id.*

[5] MCL 750.224f.

[6] MCL 750.145.

[7] MCL 750.227b.

[8] The notation of this flat, two-year sentence is an issue that is discussed *infra.*

of contributing to the delinquency of a minor. Johnson appeals as of right. We affirm but remand for clarification and correction of the felon in possession of a firearm conviction.

I. Basic Facts And Procedural History

The Wayne Police Department executed a search warrant at Johnson's home around 11:00 p.m. on September 20, 2005. When the police arrived, there was a car parked in the driveway. David Alexander, the driver of the car, attempted to strike some police officers with the vehicle and was later arrested two to three miles away. Alexander had a container of pills in his pocket.

Johnson, his wife and codefendant, Vonda Johnson, and three children, ages five, ten, and 17, were present in the house. The police brought a narcotics dog into the house, and he gave an alert at a dresser drawer in the master bedroom and the coffee table in the living room. The police found a briefcase on the living room floor by the coffee table that contained several baggies, each with a quantity of pills, several pill bottles, a black note pad that the police believed to be a narcotics ledger, empty baggies, knotted up pieces of plastic baggies, a pair of roach clips, and mail addressed to Johnson. The note pad contained people's names and amounts owed.

The different packages contained 45 methadone, 39 hydrocodone, 11 morphine, 118 codeine, 60 diazepam (valium), and 123 oxycontin pills. There was $2,750 on the coffee table beside the briefcase, along with a pill bottle containing controlled substances, and an organizer with phone numbers and prescription slips. The police also found a loaded handgun under a blanket, on the living room couch, approximately six feet from the briefcase. The handgun was registered to David Alexander.

There were two shotguns in the Johnsons' bedroom. One of the shotguns was unloaded and located between the mattress and box spring, and the other was loaded and in a vinyl case on top of the mattress. No fingerprints were taken from any of the weapons. The police also found rolling paper packages, marijuana roaches, one gram of marijuana packaged in a smaller sandwich bag, personal papers and casino slips, a handgun frame, and various types of ammunition in the bedroom. There were also two police scanners, one of which was activated and monitoring police frequencies in the area.

In the backyard, there were three marijuana plants growing among some tomato plants. There was a digital camera with pictures of the marijuana plants. The police also confiscated a computer scanner that had a prescription slip for pills face down on the glass. There were various other pill bottles found at the house. Some were empty, some had non-controlled substances, and two contained zanax or lorazepam.

The police looked up all prescriptions issued to Johnson for the year preceding the date in question in the Michigan Automated Prescription System (MAPS). On October 21, 2004, Doctor Nazier Abdul Fahad prescribed Johnson 60 tablets of lorazepam and 90 tablets of hydrocodone. This prescription was filled the same day at Med RX in Lincoln Park. On October 25, 2004, Doctor Stuart Bylieu prescribed to Johnson 90 tablets of oxycontin that was filled the same day at the Tri-City Pharmacy in Garden City. On January 6, 2005, Doctor William Rollins prescribed Johnson 90 pills of lorazepam and 90 pills of hydrocodone. This prescription was filled the same day at Med RX in Lincoln Park. Also, on January 6, 2005,

Johnson was prescribed 60 tablets of hydrocodone and 30 tablets of lorazepam by Doctor Fahad, which was filled that day at the CVS Pharmacy in Dearborn Heights.

At the trial, defense counsel conducted a voir dire examination of police officer Alan Maciag outside the presence of the jury. Officer Maciag testified that he interrogated Johnson at approximately 3:00 a.m. on September 21, 2005. Officer Maciag went through the constitutional rights form and Johnson initialed each delineated right. Officer Maciag testified that he did not make any promises to Johnson and that the interview was not recorded. After finishing the conversation, Officer Maciag said, "Okay, let's put this down in writing so you can sign the statement," but Johnson refused at that point. The trial court ruled that Johnson was afforded his constitutional rights, no threats or promises were given, and the statement was voluntarily given. The trial court allowed Officer Maciag's testimony regarding the statement.

According to Officer Maciag, Johnson told him that he was growing the marijuana plants for his wife because she liked to smoke marijuana. Johnson stated that all the pills found were prescribed to him by doctors, and he had stopped selling pills a long time ago but that he may have given a pill or two to someone. Johnson claimed that he kept the guns in the house for protection because when he was a kid, someone came into his house and raped his mother. This statement was not tape recorded or videotaped. Officer Maciag testified that he asked Johnson if he wanted to write the statement down and that Johnson said no.

The parties stipulated that, for the purpose of the felon in possession charge, Johnson had been convicted of a felony and did not have a right to possess, use, or carry a firearm because his requirements for regaining eligibility had not been met.

At the close of the prosecution's case, Johnson moved for a directed verdict, arguing that the evidence showed he was in lawful possession of the controlled substances because they were legally prescribed to him by a doctor, and there was no evidence of any intent by him to deliver the substances to another person unauthorized to possess them. In addition, Johnson argued that there was no evidence of either actual or constructive possession of a firearm. The prosecution argued that some of the substances in Johnson's briefcase were not in the MAPS database, such as codeine, morphine, or methadone. According to the prosecution, there was evidence that Johnson was selling the pills, making them illegal narcotics, because he had a possible ledger, police scanners, cash on the coffee table that the narcotics dog alerted to, baggies, different paraphernalia, and Alexander had pills in his pocket that matched some of the pills at Johnson's house. The trial court denied Johnson's motion.

Johnson testified that he broke his ankle on March 31, 2000, resulting in three surgeries and extensive physical therapy. Johnson was still seeing several doctors for the injury and receiving various medications. According to Johnson, he called Alexander on the date in question to ask for a ride to several places. Alexander was on his way to a shooting range and Johnson did not feel comfortable driving around with guns in the car, so Alexander brought his guns into Johnson's house, and Johnson locked them in the master bedroom. Two of the guns were in locked cases.

According to Johnson, he and Alexander then ran some errands and returned to Johnson's house. Vonda Johnson asked Johnson why the door to the bedroom was locked, and he told her about the guns. Vonda Johnson wanted the guns out of the house. Alexander took one of the guns out of the case to show Johnson. Johnson asked Alexander to get him a pack of cigarettes,

and Alexander left the gun sitting on the coffee table. The other two guns were on top of the mattress in the bedroom but never between the mattress and the bed springs.

Johnson asserted that he used the police scanners to listen to what was going on in the area, including when a NASA space shuttle was flying over. The money that the police found on the coffee table included casino winnings and a health insurance check. Johnson testified that he never gave or sold any of the pills in his house to someone not authorized to have them. Johnson claimed that the MAPS system was not accurate. Johnson testified that he told Officer Maciag the guns were Alexander's and that he never said that he sold or gave away any of the pills.

The jury found Johnson guilty of all counts except possession with intent to deliver oxycontin, possession with intent to deliver diazepam, and possession with intent to deliver morphine. Johnson then filed motions for judgment notwithstanding the verdict and for a new trial. Defense counsel argued that there was no evidence that Johnson possessed the firearms, and that the prosecution did not prove beyond a reasonable doubt that he intended to deliver any of the substances. The trial court denied both motions, stating that the proximity and location of the guns established constructive possession, and the sheer quantity of pills and the notebook were enough circumstantial evidence to show intent to deliver.

II. Right To Confrontation

A. Standard Of Review

Johnson argues that he was denied his Sixth Amendment right to confrontation when his wife's attorney asserted in opening statement that she was merely present in the house and knew nothing about any illegal activities that Johnson may have been involved in, and the trial court denied his motion for a mistrial. We review for an abuse of discretion a trial court's decision to deny a motion for a mistrial.[9] This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes.[10]

B. Legal Standards

The United States and Michigan Constitutions guarantee a criminal defendant the right "to be confronted with the witnesses against him."[11] The right of confrontation applies to all witnesses against the defendant who bear testimony.[12] The purpose of this right is to give an accused the opportunity to cross-examine witnesses against him.[13] If a defendant's right to confrontation is violated, he is entitled to a new trial unless the error was harmless.[14]

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[9] *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

[10] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[11] US Const, Am VI; Const 1963, art 1, § 20.

[12] *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[13] *Bruton v US*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

[14] *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005) (citation omitted).

In a joint trial, the statements of a codefendant that significantly incriminate the defendant are inadmissible if the codefendant is not subject to cross-examination.[15] Such a statement is deemed so prejudicial that a limiting instruction to the jury is not a sufficient substitute for the defendant's right of cross-examination.[16] A prosecutor desiring to use the incriminatory statement of a codefendant must "hold separate trials, use separate juries, or abandon the use of the confession[.]"[17]

C. Applying The Standards

As noted above, Johnson moved for a mistrial after Vonda Johnson's counsel maintained in his opening statement that Vonda Johnson did not know that Johnson had guns in the house or prescription medication in his briefcase. The trial court gave a curative instruction and denied the motion.

Vonda Johnson was not a witness against Johnson and did not make any statement.[18] The comments in question were clearly and merely part of Vonda Johnson's counsel's opening statement. Therefore, we conclude that the right to confrontation is not implicated in this situation.

With respect Vonda Johnson's counsel's statements, the trial court instructed the jury regarding what was evidence, explaining that what the lawyers say was not evidence, the evidence that applied to Vonda Johnson may or may not apply to Johnson, and that the jurors were the ultimate triers of fact. Therefore, any possible error was dispelled by the trial court's instruction.[19] We conclude that Johnson was not deprived of a fair trial by Vonda Johnson's counsel's remarks during the opening statement.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Johnson argues that he was denied the effective assistance of counsel where his counsel failed to move for severance of the trials. The determination whether a defendant received the effective assistance of counsel is a question of both fact and constitutional law. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo.[20]

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[15] *People v Pipes*, 475 Mich 267, 274-275; 715 NW2d 290 (2006), citing *Bruton*, *supra* at 126.

[16] *Bruton*, *supra* at 137.

[17] *Lilly v Virginia*, 527 US 116, 128; 119 S Ct 1887; 144 L Ed 2d 117 (1999) (citation omitted).

[18] *Crawford*, *supra* at 51.

[19] *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995) (citations omitted).

[20] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Legal Standards

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions, in order to protect a criminal defendant's right to a fair trial.[21] There is a strong presumption that the defendant received effective assistance of counsel, and the burden is on the defendant to prove counsel's actions were not sound trial strategy.[22]

To prevail on a claim of ineffectiveness of counsel, a defendant must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[23] A defendant must show that, but for trial counsel's errors, there would have been a different outcome.[24]

C. Applying The Standards

Johnson argues that trial counsel was ineffective for failing to file a motion for separate trials. "There is a strong public policy in favor of joint trials, and the general rule is that a defendant does not have a right to a separate trial."[25] A defendant seeking severance must show more than mere inconsistency of defenses.[26] Competing defenses must be mutually exclusive or irreconcilable, meaning that a jury would have to believe one defendant at the expense of the other.[27]

Here, Johnson's argument was that he was in lawful possession of the controlled substances because they were legally prescribed to him by a doctor, and there was no evidence of any intent by him to deliver the substances to another person unauthorized to possess them. In addition, Johnson argued that there was no evidence of either actual or constructive possession of a firearm. Vonda Johnson's defense was that, in addition to the lack of evidence of intent to deliver and possession of a firearm by Johnson, there was no evidence that she had any involvement in the charges regarding the pills and firearms. These two defenses are not mutually exclusive or even inconsistent because the jury could believe either defendant, both defendants, or neither one. In fact, Johnson's own testimony indicated that Vonda Johnson did not know the guns were in the house, which was completely consistent with her theory of defense. Also, Vonda Johnson was charged as an aider and abettor, so Johnson's arguments were necessarily incorporated into her defense.

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[21] US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[22] *Strickland*, *supra* at 689; *LeBlanc*, *supra* at 578.

[23] *Strickland*, *supra* at 687; *LeBlanc*, *supra* at 578; *People v Pickens*, 446 Mich 298, 308-309; 521 NW2d 797 (1994).

[24] *Pickens*, *supra* at 314.

[25] *People v Meyers* (*On Remand*), 124 Mich App 148, 156; 335 NW2d 189 (1983).

[26] *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994).

[27] *Id.* at 349-350.

Thus, there was no basis upon which to move for severance of the trials. "Trial counsel is not required to advocate a meritless position."[28] We conclude that the evidence shows that trial counsel's performance did not fall below an objective standard of reasonableness, and Johnson was not deprived of a fair trial.

IV. Juror Lewis

A. Standard Of Review

Johnson asserts that the trial court erred in failing to remove Judith Lewis as a juror after defense counsel learned that she was married to a defense attorney. We review a trial court's decision regarding removal of a juror for an abuse of discretion.[29]

B. Legal Standards

An individual accused of a crime has a constitutional right to be tried by a fair and impartial jury.[30] "[A] defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury."[31] On the other hand, there is no constitutional right to exercise peremptory challenges.[32] If, after the jury is sworn, information is discovered about a juror that may affect that juror's impartiality, the defendant is entitled to relief if he demonstrates: "(1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause."[33] A party may challenge a juror for cause if the juror "has preconceived opinions or prejudices, or such other interest or limitations as would impair his or her capacity to render a fair and impartial verdict."[34]

C. Applying The Standards

Here, before the start of the second day of trial, defense counsel informed the court that he had just found out that Lewis was married to a criminal defense attorney. Defense counsel asserted that he probably would have used a peremptory challenge to remove her had he known that information and requested that the trial court conduct a voir dire. The trial court conducted a voir dire, and Lewis indicated that she was never asked if she was married to an attorney, she had not discussed the case with her husband, and she had not formed an opinion of the case. The trial court concluded that Lewis was very credible and candid, and concluded that she could be a fair and impartial juror.

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[28] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

[29] *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

[30] US Const, Am VI; Const 1963, art 1, § 20.

[31] *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998).

[32] *People v Juarez*, 158 Mich App 66, 71; 404 NW2d 222 (1987).

[33] *Daoust*, *supra* at 9.

[34] *People v Eccles*, 260 Mich App 379, 382; 677 NW2d 76 (2004).

Under these circumstances, we conclude that Johnson has not demonstrated that he was prejudiced by Lewis serving on the jury or that she would have been excusable for cause. The trial court asked the first panel of prospective jurors if they had any friends or family members who were lawyers, and six of them replied that they did. The trial court informed them that they could not discuss the case with those family members or friends. These six prospective jurors were never challenged for cause. Three of these six jurors were dismissed by defense counsel's peremptory challenges, and the other three remained on the jury. Lewis filled the place of a dismissed juror and was never asked if she had friends or family members who were lawyers.

The only challenge for cause made by defense counsel was for a juror whose son was a lawyer and whose nephew was a police officer in the city of Wayne. The basis of the challenge was the involvement in the case of several police officers from Wayne. The trial court denied the challenge. Vonda Johnson's defense counsel used a peremptory challenge to dismiss this juror. There is no evidence that Lewis would have been dismissed for cause merely because her husband was an attorney. In addition, the trial court was in the best position to assess her credibility and conclude that she could be fair and impartial.[35] A defendant is not entitled to relief if, had the information been revealed before trial, he would have dismissed the juror by exercising a peremptory challenge.[36]

V. Right To Remain Silent

A. Standard Of Review

Johnson asserts that the prosecutor's introduction of evidence that he refused to make a written statement to the police violated his constitutional right to remain silent at the time of arrest and any time thereafter. Johnson did not object to the testimony in question, so this issue is unpreserved.[37] We review unpreserved claims for plain error.[38] To avoid forfeiture: 1) an error must have occurred, 2) the error must be clear or obvious, 3) and the error must have affected substantial rights, meaning it affected the outcome of the trial.[39]

B. Legal Standards

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions.[40] A defendant's statements made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.[41] When a defendant challenges the admissibility of his statements, the trial court must

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[35] *People v Lee*, 212 Mich App 228, 251; 537 NW2d 233 (1995).

[36] *Daoust*, *supra* at 8.

[37] *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

[38] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[39] *Id.* at 763.

[40] US Const, Am V; Const 1963, art 1, § 17.

[41] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

hear testimony regarding the circumstances of the defendant's statement outside the presence of the jury.[42] The prosecution may use custodial statements as evidence once it is demonstrated that the defendant validly waived his *Miranda* rights.[43]

C. Applying The Standards

As noted above, defense counsel conducted a voir dire examination of Officer Maciag outside the presence of the jury to determine whether Johnson's statements to Officer Maciag would be admissible. The trial court ultimately ruled that Johnson was afforded his constitutional rights, no threats or promises were given, and the statement was voluntarily given. The trial court allowed Officer Maciag's testimony regarding the statement.

As noted above, Johnson told Officer Maciag that he was growing the marijuana plants for his wife because she liked to smoke marijuana. Johnson stated that all the pills found were prescribed to him by doctors, and he had stopped selling pills a long time ago but that he may have given a pill or two to someone. Johnson claimed that he kept the guns in the house for protection because, when he was a kid, someone came into his house and raped his mother. Officer Maciag asked Johnson if he wanted to write the statement down, and he said no.

Johnson does not challenge the waiver of his *Miranda* rights, but asserts that the testimony regarding his refusal to put the statement in writing was impermissible. An individual's exercise of his right to silence cannot be used against him at trial.[44] However, there is no invocation of the right to silence where the defendant has made a statement.[45] In this case, Johnson made a statement to the police, so there was no exercise of his right to silence. Therefore, we conclude that Johnson's right to silence was not used against him at trial.

VI. Sufficiency Of The Evidence

A. Standard Of Review

Johnson argues that the evidence presented was insufficient to convict him of possession with intent to deliver the controlled substances, felon in possession of a firearm, and felony-firearm. We review a sufficiency of the evidence claim de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt.[46] Direct and circumstantial evidence is viewed in the light most favorable to the prosecution.[47]

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[42] *People v Walker* (*On Rehearing*), 374 Mich 331, 337-338; 132 NW2d 87 (1965).

[43] *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

[44] *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973).

[45] *People v Collier*, 105 Mich App 46, 51; 306 NW2d 387 (1981).

[46] *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

[47] *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

B. Legal Standards

MCL 333.7401 provides that "a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form." Johnson is contesting that he had possession with intent to deliver the pills found in the briefcase. Possession may be actual or constructive, where a defendant has the right to exercise control over the substance and knowledge of its presence.[48] Intent to deliver may be inferred from all the facts and circumstances, and minimal circumstantial evidence is sufficient.[49] The quantity of the controlled substance and the way it is packaged may be considered in determining whether there was intent to deliver.[50]

C. Applying The Standards

Here, as noted above, during the execution of the search warrant, the police brought a narcotics dog into Johnson's house, and he gave an alert at a dresser drawer in the master bedroom and the coffee table in the living room. The police found a briefcase on the living room floor by the coffee table that contained several baggies, each with a quantity of pills, several pill bottles, a black note pad that the police believed to be a narcotics ledger, empty baggies, knotted up pieces of plastic baggies, a pair of roach clips, and mail addressed to defendant. The note pad contained people's names and amounts owed. The different packages contained 45 methadone, 39 hydrocodone, 11 morphine, 118 codeine, 60 diazepam (valium), and 123 oxycontin pills. There was $2,750 on the coffee table beside the briefcase, along with a pill bottle containing controlled substances, and an organizer with phone numbers and prescription slips.

The police also found rolling paper packages, marijuana roaches, one gram of marijuana packaged in a smaller sandwich bag, personal papers and casino slips, a handgun frame, and various types of ammunition in the bedroom. There were two police scanners, one of which was activated and monitoring police frequencies in the area. David Alexander, who attempted to strike some police officers with his vehicle in the driveway and was later arrested two to three miles away, had a container of pills in his pocket. Based on this evidence, we conclude that a rational fact finder could have concluded that Johnson possessed the controlled substances with the intent to deliver.

A person convicted of a felony "may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute" a firearm in Michigan until three years after he has paid all fines for the violation, served all prison terms for the violation, and completed all conditions of probation or parole for the violation.[51] If the defendant was convicted of a "specified felony," the period of time is five years.[52] In this case, both parties stipulated that Johnson had previously been

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[48] *Wolfe*, *supra* at 519-520.

[49] *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003).

[50] *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

[51] MCL 750.224f; *People v Dillard*, 246 Mich App 163, 169; 631 NW2d 755 (2001).

[52] MCL 750.224f(2); *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

convicted of a felony and had not regained his eligibility to carry a firearm. Johnson, however, disputes the element of possession.

Possession is a question of fact to be answered by the jury.[53] Possession can be exclusive or joint, actual or constructive.[54] A defendant has constructive possession of a firearm if there is "proximity to the article together with indicia of control."[55] This means that the defendant knows the location of the weapon and has ready access to it.[56] Possession can be shown by circumstantial evidence.[57]

Here, the police found a loaded handgun under a blanket on Johnson's living room couch, approximately six feet from the briefcase. The handgun was registered to Alexander. There were two shotguns in the Johnsons' bedroom. One of the shotguns was unloaded and located between Johnson's mattress and box spring, and the other was loaded and in a vinyl case on top of the mattress. Johnson's own testimony indicated that he knew the location of the guns in his house. The location of the guns in Johnson's bedroom and on the couch is sufficient to show that he had ready access to them.[58] Therefore, we conclude that a rational factfinder could have concluded beyond a reasonable doubt that Johnson had constructive possession of the firearms.

Felony-firearm is an offense covering a "person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony[.]"[59] Possession has already been established, and felon in possession of a firearm can serve as the underlying felony for the felony-firearm conviction.[60] Therefore, we conclude that the evidence was sufficient to convict Johnson of felony-firearm.

VII. Johnson's Sentence

A. Standard Of Review

Johnson asserts that this Court must remand for correction of the erroneous two-year flat consecutive term for the felon in possession of a firearm conviction. Johnson failed to object at the sentencing hearing, so this issue is not properly preserved for appeal.[61] Generally, the trial

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[53] *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989).

[54] *Id.* at 470.

[55] *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), citing *People v Davis*, 101 Mich App 198; 300 NW2d 497 (1980).

[56] *Burgenmeyer*, *supra* at 438.

[57] *Hill*, *supra* at 469.

[58] *Burgenmeyer*, *supra* at 438.

[59] MCL 750.227b(1); *People v Guiles*, 199 Mich App 54, 58; 500 NW2d 757 (1993).

[60] *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998), citing *Guiles*, *supra* at 59.

[61] *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

court's sentencing decision is reviewed for an abuse of discretion, but when unpreserved, review is limited to whether there was plain error that affected substantial rights.[62]

B. Legal Standards

In general, a defendant is entitled to resentencing where a sentence is based on a mistaken belief in the law.[63] The sentence for felony-firearm is a mandatory two years in prison to be served consecutively with the term of imprisonment for the conviction of the felony.[64] The sentence for felon in possession of a firearm is a term of imprisonment up to five years.[65]

C. Applying The Standards

Here, Johnson's judgment of sentence reflects two years in prison for both the felon in possession of a firearm conviction and the felony-firearm conviction, both running consecutively to the other convictions. It is unclear from the record what sentence the trial court meant to give Johnson for the felon in possession of a firearm conviction and whether this was merely a clerical error. The trial court referred to a mandatory five-year term for the felon in possession of a firearm conviction but was interrupted twice, and the actual sentence for that conviction was never completely enumerated on the record. Therefore, because the intended sentence range cannot be ascertained, this case is remanded for clarification and correction of the sentence.[66]

Remanded for clarification and correction of the felon in possession of a firearm conviction, and affirmed with respect to Johnson's convictions and all other sentences. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

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[62] *Id.* at 227-228.

[63] *Id.* at 228.

[64] MCL 750.227b(1) and (2).

[65] MCL 750.224f(3).

[66] See *People v Thompson*, 189 Mich App 85, 87-88; 472 NW2d 11 (1991).